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No. 02-1447

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES CORP.
AND DELTA AIR LINES, INC.,
Petitioners,

v.

NELSON CHASE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. PLAINTIFFS' OPPOSITION UNDERSCORES THE IMPORTANCE OF ESTABLISHING THIS COURT'S JURISDICTION TO REVIEW DENIALS OF INTERLOCUTORY APPEALS 1

II. THE DECISIONS BELOW EXACERBATE THE CIRCUIT CONFLICT REGARDING EVALUATION OF COMPETING EXPERT EVIDENCE AT THE CLASS CERTIFICATION STAGE 3

III. THE FAILURE TO CONSIDER THE IMPACT OF DEFENDANTS' EVIDENCE EXACERBATES A CIRCUIT CONFLICT 5

IV. THE PETITION IS NOT "MOOT" 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998) 6

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 8

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 10

General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147 (1982) 4

Hohn v. United States, 524 U.S. 236 (1998) 1

In re Northwest Airlines Corp., 197 F. Supp. 2d 908 (E.D. Mich. 2002) 4

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002) 2, 4, 6

Johnson v. HBO Film Mgmt., Inc., 265 F.3d 178 (3d Cir. 2001) 5

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) 2

Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001) 5

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 9-10

Waste Mgmt. Holdings v. Mowbray, 208 F.3d 288 (1st Cir. 2000) 6

West v. Prudential Secs., Inc., 282 F.3d 935 (7th Cir. 2002) 5

Zenith Labs., Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976) 2

STATUTES AND RULES

28 U.S.C. § 1254 1-2

28 U.S.C. § 1292(b) 1

FED. R. CIV. P. 23(b) ..... *passim*

FED. R. CIV. P. 23(c)(1) 8

FED. R. CIV. P. 23(f) ..... *passim*

FED R. EVID. 702 3

I. PLAINTIFFS' OPPOSITION UNDERSCORES THE IMPORTANCE OF ESTABLISHING THIS COURT'S JURISDICTION TO REVIEW DENIALS OF INTERLOCUTORY APPEALS

Plaintiffs acknowledge that the jurisdictional question presented in the Petition is unsettled. Their contention that the Court lacks jurisdiction thus serves to highlight the national importance of deciding this issue, the resolution of which will affect litigants not only in class action cases, but also in many other cases where the courts of appeals decline to accept for immediate appellate review orders certified under 28 U.S.C. § 1292(b).

Indeed, plaintiffs raise arguments that underscore the significance of this case to refining the contours of this Court's jurisdiction. For example, plaintiffs claim that the Advisory Committee Notes to Rule 23(f) "strongly suggest" jurisdiction is absent here. (Opp. 11). On the contrary, the scope of a circuit court's discretion to grant or deny a request for review made pursuant to Rule 23(f) has no bearing on whether this case was "in the court of appeals," as that phrase is used in 28 U.S.C. § 1254, the statutory grant of certiorari jurisdiction.

Similarly, plaintiffs contend that the jurisdictional determination in *Hohn v. United States*, 524 U.S. 236 (1998), rested on the "finality" of the district court's order denying post-conviction relief. Plaintiffs cite a passage from *Hohn* in which the Court observed that, "as a general rule, when the district court has denied relief and applicable requirements of finality have been satisfied, the next step is review in the court of appeals." (Opp. 13). Yet that statement came in a discussion about whether an application for a certificate of appealability constituted a "case" as the term is used in 28 U.S.C. § 1254. Thus, the cited passage lends no support to plaintiffs' argument that this Court's jurisdiction depended in any way on "finality." To the contrary, the Court's

authority to review interlocutory rulings is well-established. *See* 28 U.S.C. § 1254(1) (providing for certiorari "before or after rendition of judgment or decree"); *see also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 205-06 (1990) (certiorari granted to hear interlocutory appeal and resolve circuit conflict).

Plaintiffs' contention that jurisdiction is lacking because the district court's class certification ruling is subject to revision is specious. (Opp. 13). Rule 23(f) expressly provides for interlocutory review of class certification decisions, even though every class certification order is subject to modification until the time judgment is entered. *See Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976). There is no indication that Congress intended to preclude this Court from reviewing cases that are "in the court of appeals" by virtue of a request for appellate review under Rule 23(f). Thus, the fact that the underlying class certification order is interlocutory and subject to modification has no bearing on this Court's jurisdiction. *See generally In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 151 (2d Cir. 2001) (Jacobs, J., dissenting) ("if district courts can postpone consideration of difficult issues by making certification 'conditional' (as all certifications tend to be anyway), it is unlikely that we would ever vacate such an order" under Rule 23(f)), *cert. denied*, 536 U.S. 917 (2002).

Moreover, in this case, there is no realistic prospect of modifications to the certification order that would preserve defendants' rights to a fair and manageable trial. This is particularly true since at a status conference on December 19, 2002 the district court disposed of issues left unresolved

in the certification order, but left intact all aspects of the order relevant here.[1]

II. THE DECISIONS BELOW EXACERBATE THE CIRCUIT CONFLICT REGARDING EVALUATION OF COMPETING EXPERT EVIDENCE AT THE CLASS CERTIFICATION STAGE

Plaintiffs insist the Petition does not demonstrate disagreement among courts of appeals regarding the responsibility of trial courts to evaluate competing expert evidence at the class certification stage. Their position, however, is based upon the false claim that Petitioners contend district courts should decide at the class certification stage "whether the plaintiff will prevail on the merits" (Opp. 18), and "must resolve the ultimate facts contested in the expert evidence. " (Opp. 20). Petitioners argue no such thing.

Rather, it is a district court's responsibility to evaluate competing expert testimony and other evidence with the rigor necessary to determine whether the requirements of Rule 23 have been met, even if that involves some inquiry into evidence that also relates to the merits. Here, the district court confused its gatekeeping responsibility under FED. R. EVID. 702 with its obligation to scrutinize the suitability of the case for certification under Rule 23. (*See* Pet. 19-20 n.15). Having decided that plaintiffs' experts survived "gatekeeping scrutiny under FED. R. EVID. P. 702"

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[1] The district court ordered plaintiffs to add class representatives so that at least one representative had flown to or from each of the seven hubs serving as an origin or destination for the 234 routes at issue in the case (*see* 115a n.41), and ordered the parties to proceed with preparation for distribution of the class notice (*see* 130a n.47). The district court rejected defendants' request that it require that at least one class representative had flown in each of the 234 relevant markets during the class period.

(111a n.40), the court refused to "delve into the merits" of their opinions. (110a). Instead, the court concluded, "it is enough that Plaintiffs and their experts have put forward a 'colorable method' of establishing their antitrust claims through generalized, class-wide proof." (110a-111a).[2] Thus, the court failed to perform the "rigorous analysis" mandated by *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147 (1982). This uncritical reliance on the opinions of plaintiffs' experts for purposes of class certification is especially problematic because the district court's *Daubert* ruling repeatedly expressed concerns about the very same evidence. *See, e.g., In re Northwest Airlines Corp.*, 197 F. Supp. 2d 908, 915 (E.D. Mich. 2002) (testimony on relevant markets "somewhat lacking in analytical rigor"); *id.* at 926 ("the Court readily acknowledges that Dr. Beyer's assessment of damages is vulnerable to attack on a number of the grounds identified by Defendants"); *id.* at 928 (noting the "Court's considerable skepticism as to Dr. Beyer's claim that hidden-city and hub-spoke tickets offer exactly the same product for purposes of the damage analysis").

Contrary to plaintiffs' assertion, there is a clear circuit conflict on this issue. (Pet. 19-21). The Second Circuit restricts consideration of expert evidence at the class certification stage to whether the theory proffered by the plaintiffs' expert is "fatally flawed." *See Visa*, 280 F.3d at 135. Moreover, the Second Circuit prohibits consideration of competing expert evidence offered to rebut the plaintiffs' theory. *See id.* The Seventh Circuit, on the other hand, requires the district court to choose "between competing

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[2] According to the district court, its "finding that Plaintiffs' expert testimony satisfied the Court's gatekeeping inquiry under Rule 702 . . . somewhat foret[old] the defeat of several of the Airlines arguments" in opposition to class certification. (39a n.16).

[expert] perspectives" related to the Rule 23 requirements, even if "each side has [some] support." *See West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). These approaches are diametrically opposed. The Seventh Circuit's standard embodies the rigorous analysis that Rule 23 demands, while the Second Circuit's overly deferential standard renders class certification virtually automatic, so long as the plaintiffs employ a reputable expert.

Plaintiffs' attempt to harmonize the Second Circuit's approach with that of the Third and Seventh Circuits by quoting a passage from *Visa* which states that the district court considered "each of defendants' criticisms of [plaintiffs' expert's] theory" (Opp. at 19) is unavailing. Consideration of criticisms to determine whether a theory is "fatally flawed" is the full extent to which the Second Circuit allows evaluation of expert evidence offered in support of class certification. This highly deferential standard starkly conflicts with the approach of the Third and Seventh Circuits, which require the district court to make "whatever factual and legal inquiries are necessary." *See Johnson v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 188 (3d Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001); *West*, 282 F.3d at 938 ("[t]ough questions must be faced and squarely decided, *if necessary by holding evidentiary hearings*") (emphasis added).

III. THE FAILURE TO CONSIDER THE IMPACT OF DEFENDANTS' EVIDENCE EXACERBATES A CIRCUIT CONFLICT

Plaintiffs do not disagree that under Rule 23(b)(3) it is the entire "action" that must be manageable and as to which common issues must predominate, not merely plaintiffs' half of the case. Choosing their words carefully, plaintiffs instead maintain "there can be no question that the district court carefully considered Defendants' proposed proof."

(Opp. 23). Petitioners have never contended, however, that the district court failed to consider their proposed evidence, at least to the extent of recognizing its relevance and defendants' right to offer it at trial. Rather, the class certification decision below was erroneous because the district court did *not* evaluate the impact of detailed, highly individualized, market-specific evidence on the suitability of the case for class certification: "All that matters, at this stage, is that Plaintiffs' theory of liability rests upon a colorable analytical method that is susceptible to generalized proof." (121a).

The failure to consider whether the defendants' half of the case would make the "action" unmanageable is consistent with approach of the Second Circuit but in conflict with the weight of circuit authority. *Compare Visa*, 280 F.3d at 150-51 (Jacobs, J., dissenting) (explaining the majority avoided addressing manageability problems arising from an affirmative defense by erroneously relying on the district court's designation of its certification order as "conditional"), *with Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("[T]he law is settled that affirmative defenses should be considered in making class certification decisions."); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 145-49 (3d Cir. 1998) (holding that both defendant's rebuttal to plaintiff's generalized proof and defendant's affirmative defenses rendered action inappropriate for class treatment).

IV. THE PETITION IS NOT "MOOT"

Plaintiffs contend that the "need for interlocutory review is rendered moot" because the district court certified both Section 1 and Section 2 classes, and the Section 1 class would survive even if the Section 2 class were not certified. (Opp. 15-17). Plaintiffs are wrong both on the facts and the law.

The Petition seeks review of the legal rulings underpinning the district court's refusal: (1) to resolve conflicts between plaintiffs' and defendants' expert evidence, which was essential to proper evaluation of Rule 23's predominance and manageability requirements; and (2) to account for defendants' evidence when evaluating whether the case is amenable to class treatment. Those legal rulings indisputably relate to both the Section 1 and Section 2 claims and classes – most significantly to injury-in-fact and antitrust injury, which are essential element of *both* claims.

As for the Section 1 claim, the district court observed, "Plaintiffs evolving theory of the unlawful conspiracy in this case" includes the "apparent concession [by Plaintiffs] that each Airline remain[ed] 'free to prevent hidden city-ticketing' in 'whatever manner or degree it saw fit'" (59a), and the only conspiracy now alleged is one "to deter" hidden city ticketing. (37a-38a, 73a). The only antitrust injury that could flow from such a conspiracy would be that caused by the incremental effects of the "deterrence," rather than by lawful, unilateral conduct by the defendants.

Plaintiffs' "proof" of injury-in-fact and antitrust injury for *both* their Section 2 and Section 1 claims rests on the assertions of their expert (Dr. John Beyer) about what would have occurred but for the challenged prohibitions on hidden city ticketing – what has been described in the case as the "but-for world." The linchpin of Dr. Beyer's "but-for world" was his claim that if the airlines were unable to prohibit hidden city ticketing, they would have reduced ***all*** of their spoke-hub fares on every one of the 234 routes at issue to levels representing averages of his thousands of hidden city "benchmarks" (a claim which conveniently dispensed with the need for any market-specific, factual inquiry).

Plaintiffs' "but-for world" counterfactually assumes that no hidden city prohibitions would exist or be enforced absent the alleged conspiracy, even though the district court found that various airlines had unilaterally adopted hidden city ticketing prohibitions (23a-24a, 59a) and could unilaterally enforce those prohibitions with considerable effect (55a-56a, 65a n.26).

The district court nonetheless accepted Dr. Beyer's "one-size-fits-all" approach to injury as a sufficient showing of common, classwide evidence for both the Section 1 and Section 2 claims. As with conflicting evidence on other essential elements of plaintiffs' claims, the court construed defendants' argument that highly individualized inquiry would be required to identify class members who were in fact deterred by the alleged conspiracy (and not by unilateral enforcement) as an "invitation to weigh in on the battle of experts," which it declined. (120a). And again, while acknowledging defendants' right to produce highly specific and individualized evidence contesting plaintiffs' broad-brush approach, the district court failed to consider the impact of that evidence on the predominance and manageability standards it was bound to apply. *See* FED. R. CIV. P. 23(c)(1); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996) ("Prior to certification, the district court must determine whether variations [among the causes of action asserted by the class] defeat predominance.").[3]

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[3] Plaintiffs are wrong in suggesting that the district court's tentative inclination that only a "quick look," rather than a full blown Rule of Reason analysis, might be appropriate negated defendants' ability to present market-by-market proof of the effects of the hidden city rules. (Opp. 16). The district court did not rule out the need for a full blown "Rule of Reason" analysis: "[T]he present record does not dictate with any degree of certainty precisely what level of analysis should be applied, much less what the outcome of such an analysis would be." (83a). Nor did the district court in any way foreclose defendants from offering

(continued....)

Similarly, the district court failed to consider the impact on manageability of defendants' evidence responsive to plaintiffs' use of hidden-city routes as "competitive benchmarks" to prove injury and damages for both their Section 1 and Section 2 claims. (116a). Defendants presented expert testimony and other evidence that the comparability of hub-spoke routes with thousands of dissimilar hidden city spoke-spoke routes could not simply be assumed, as under Dr. Beyer's approach. Rather, determining proper benchmarks would require detailed comparison of the characteristics of each of thousands of hidden city spoke-spoke routes with the hub-spoke routes for which they purportedly served as benchmarks – as well as thousands of other spoke-spoke routes that did not create "hidden city savings," which Dr. Beyer ignored in his analysis (116a). As the district court recognized, "the hidden-city benchmark analysis put forward by Plaintiffs' expert, Dr. Beyer, must confront a number of difficult questions" (118a) and raises "a number of legitimate concerns" (117a n.42). The district court also expressed "serious reservations about the use of hidden-city fares as a measure of purported hub premiums." (102a n.38). Only by ignoring defendants' particularized and market-specific evidence in assessing predominance and manageability was certification granted despite the "difficult questions" presented by plaintiffs' approach, and despite the district court's own "reservations."

Moreover, even if plaintiffs were correct as to the facts of the district court's rulings, the mootness doctrine would have no application here as a matter of law. *See United*

(continued) . . .

market-by-market evidence of competitive effects, even if plaintiffs were permitted to proceed on the basis of a "quick look."

States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) ("mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome'" (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 572 (1984) (rejecting mootness argument and explaining Respondents cannot "obtain a favorable [order] and then insulate that ruling from appellate review by claiming they are no longer interested in the matter"). Even if (contrary to fact) the Section 1 class could stand if the district court's rulings on predominance and manageability were reversed, the issues raised as to the Section 2 class remain "live" and of "legally cognizable interest" to the parties.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, certiorari should be granted.

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Respectfully submitted,

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